Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

WILLIAM E. ROUSSIN,

Petitioner,

v.

THE STATE OF MISSOURI,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to Supreme Court Rule 10.1(c) the Court of Appeals has decided a federal question is a way that conflicts with applicable decisions of this Court; pursuant to Rule 10.1(a) the Court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power and supervision:

1. Whether the Court of Appeals and the District Court's failure to conduct an in camera review or inspection of the grand jury documents sought to be disclosed constitutes a violation of Petitioner's Fifth Amendment due process rights.

2. Whether Respondent's failure to exhaust or even initiate alternative discovery methods prior to its request for disclosure constitutes a violation of Petitioner's Fifth Amendment due process rights.

LIST OF ALL PARTIES

1. Respondent: State of Missouri by John Munich, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

2. Petitioner: William E. Roussin, Pro Se, Reg. No. 23152-044, P.O. Box 6000, Greenville, Illinois 62246.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. Opinion of the United States Court of Appeals, Eighth Circuit styled "In Re Grand Jury Investigation," Nos. 95-2623EMSL, 95-2624EMSL and 95-2625EMSL of August 3, 1995.

2. Order of the United States District Court, Western District of Missouri, Southern Division styled "In Re Grand Jury Investigation, State of Missouri v. WER, R & R and SKR," Nos. 94-3241, 94-3242 and 94-3243 of May 5, 1995.

3. Order of the United States District Court, Eastern District of Missouri, Eastern Division styled "In Re Grand Jury Investigation Relative to Morris Kessler" No. 4:94MC37-DJS (order under seal) of May 8, 1995.

4. Opinion of the United States Court of Appeals, Eighth Circuit denying rehearing dated September 1, 1995.

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction of this matter pursuant to 28 U.S.C.A. §1254 and Supreme Court Rule 10.1(a) and (c). The date of entry of the judgment of the U.S. Court of Appeals, Eighth Circuit is August 3, 1995 which Petitioner seeks this Court to

review. The date of entry of the Order respecting rehearing of the U.S. Court of Appeals, Eighth Circuit is September 1, 1995, which Petitioner seeks this Court to review.

The following constitutional provisions, statutes, rules and ordinances are involved in the case:

1. Fed.R.Crim.Pro. 6(e). Set forth in total in Petitioner's Appendix.

2. Amendment V, United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

The State of Missouri, Respondent herein, initiated this cause of action in the United States District Court, Eastern District of Missouri, Eastern Division styled "In Re Grant Jury Investigation Relative to Morris Kessler" by the filing of its Motion For Access to Grand Jury Documents, etc., under Case No. 4:94MC37. Petitioner filed his Motion to Intervene, Motion For A Hearing and

Motion in Opposition to Respondent's Motion For Access, etc. Respondent sought this information in connection with its civil action Complaint for damages filed in the United States District Court, Eastern District of Missouri, Eastern Division, Case No. 4:93CV2633-DJS. petitioner challenged Respondent's motion on nine (9) grounds: (1) Respondent was not the real party in interest; (2) Respondent was precluded from filing its access motion for failing to comply with the requirements of Rule 9(b) Fed.R.Civ.Pro. in its pending civil complaint; (3) That pursuant to Fed.R.Crim.Pro. 6 (e) the information sought constituted "matters occurring before the grand jury;" (4) Respondent failed to make a showing of particularized need; (5) The District Court should have held a hearing in open court before ruling on Respondent's motion; (6) That the District Court should not consider a statement of an Assistant U.S. Attorney sent to the Court giving his "opinion" as to whether access should be granted; (7) That Respondent was precluded from access because it failed to comply with the initial threshold six condition test set forth in *U.S. v. Armco Steel Corp.*, 458 F.Supp. 784 (1978); (8) That the District Court never reviewed in camera or otherwise the documents that it ruled were disclosable; (9) That the Respondent failed to exhaust or initiate alternative discovery methods prior to its request for disclosure and has sought no discovery other than via its motion for access to grant jury materials.

On August 9, 1994 the United States District Court, Western District of Missouri, Southern Division granted access to Respondent regarding grand jury materials requested in that District. The Eighth Circuit Court of

Appeals affirmed that decision on May 5, 1995. (That decision is presently pending on an application for writ of certiorari to this Court). Three days later on May 8, 1995, the U.S. District Court, Eastern District of Missouri, Eastern Division simply adopted the rulings of the U.S. District Court, Western District of Mo., Southern Division and the Eighth Circuit Court of Appeals without rendering its own separate opinion. As regards District Court jurisdiction, Respondent cited Fed.R.Crim.Pro. 6 (3)(3)(C) and (D).

On June 8, 1995 Petitioner filed its notice of appeal to the United States Court of Appeals, Eight Circuit. The Eighth Circuit summarily affirmed the District Court's ruling on August 3, 1995 without briefs or argument. The Eighth Circuit Court of Appeals' jurisdiction is pursuant to 28 U.S.C. §1291 and Fed. Rules of App. Pro. 3 and 4.

Before the District and the Court of Appeals there was no testimony and therefore there is no transcript of proceedings. The District Court ruled after presentation of motions and supporting memorandums filed by the parties. The Court of Appeals summarily ruled.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. THE COURT OF APPEALS AND THE DISTRICT COURT FAILED TO CONDUCT AN IN CAMERA REVIEW OR INSPECTION OF THE GRAND JURY DOCUMENTS SOUGHT TO BE DISCLOSED WHICH CONSTITUTES A VIOLATION OF PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS

The leading case in the area of grand jury disclosure in the Eighth Circuit is *U.S. v. Armco Steel Corp.*, 458 F.Supp. 784 (W.D. Mo. 1978). In that case the exact question of whether memorandums and documents subpoenaed and prepared prior to grand jury proceedings could be unsealed as an exception to Fed.R.Crim.Pro. 6(e) was addressed. The Court answered strongly in the negative. The fact that the Respondent is not seeking actual transcripts of grand jury testimony is irrelevant. The Court stated, " . . . The Court has concluded on the merits that the memoranda in question constitute grand jury materials. Rule 6(e) is phrased in terms of ' . . . matters occurring before the grand jury . . . ' Thus, by the terms of the rule, the secrecy is not limited to transcripts but encompasses *anything* that might tend to reveal what transpired in the grand jury room." (emphasis provided). *U.S. v. Armco Steel Corp.* at 789. The Court went on to state, "Accordingly, it is not significant that the government memoranda were prepared prior to the grand jury proceedings, rather than after . . . In both instances, Rule 6(e) must be applied because disclosure of the document would tend to disclose what transpired before the grand jury." Supra at 790. At n. 20, p. 790 of *Armco* the Court

also stated, "Applying the policy of secrecy to the interview memoranda in question is consistent with this consideration of encouraging witnesses to come forward and to speak freely and candidly."

The Respondent has repeatedly stated and acknowledged that its civil complaint seeking damages is speculative. Indeed, Respondent asserts that its need for this documentation is based on its inability to frame a complaint that specifies the nature of liability and damages and the extent of damages. The Court in *In Re Special February 1975 Grand Jury,* 652 F.2d 1302 (C.A. 7 Ill. 1981) held that disclosure is not warranted where the case upon which disclosure is sought is too embryonic, speculative and uncertain.

Neither the District Court nor the Court of Appeals herein conducted an in camera review of the documents requested. Consequently, no informed decision could be made as to whether these requested documents disclose the inner workings of the grand jury or constitute "matters occurring before the grand jury." The carte blanche disclosure without a scintilla of knowledge as to the subject matter, content, extent or nature of these documents was pure speculation on the part of the District Court and Court of Appeals and resulted in a flagrant violation of Petitioner's right to due process. Additionally neither the District Court nor the Court of Appeals in affirming summarily afforded any opportunity, through notification, to the witnesses who gave interviews to object to their grand jury information being disclosed. This opportunity to object must be given. See *Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir. 1977); *In Re Special February 1971 Grand Jury v. Conlisk,* 490 F.2d 894

(7th Cir. 1973) and *In Re Holovachka*, 317 F.2d 834 (7th Cir. 1963).

It is clear that a District Court has the obligation to review grand jury related documents prior to making a determination that said documents are disclosable under an exception to Rule 6(e) Fed.R.Crim.Pro. Incredibly, to this date, there has been no indication by the District Court or the Court of Appeals that any court, judicial officer or judge has ever reviewed any of the documents sought. The Court in *Menendez v. U.S.*, 393 F.2d 312, 316 (C.A. Fla. 1968) cert. den. 393 U.S. 1029 (1968) stated, " . . . in deciding whether a case has been made for disclosure which outweighs the policy of secrecy, it is better practice for the trial court to inspect the grand jury testimony." Citing *Dennis v. U.S.*, 384 U.S. 855, 873 (1966). In *In Re Grand Jury Proceedings*, 654 F.2d 268, 277-78 (C.A. Pa. 1981) cert. den. 454 U.S. 1098 (1981) the Court went even further. There, a federal district judge ordered a state court judge to meet with the U.S. Attorney to review grand jury documents so that the state court judge could determine if any of the documents were relevant to the defendant's defense. Defendant had requested the disclosure. The Court found this to be "agreeable to the usages and principles of law." Supra at 277. In addition to the fact that this highlights the fact that no one in this case has reviewed the documents for their relevancy, but merely assumed that premise, it also raises the issue that the request for disclosure should have been directed by the Respondent to the District Judge either overseeing the grand jury in question or at least one of the sentencing judges involved in the criminal prosecutions of Petitioner and others. Instead, Respondent sought this information

from the District Judge assigned to the civil cause of action who has neither seen the documents nor had a participation history in the grand jury or related criminal prosecutions.

Other Courts have determined that the trial court should examine or review grand jury documents before it rules as to their disclosability. In *U.S. v. Firmin*, 589 F.Supp. 828 (D.C. Pa. 1984) the Court held in response to the defendant's request for grand jury records that the district court should conduct an in camera review prior to disclosure. See also *United States v. Provenzano*, 688 F.2d 194 (3d Cir. 1982) cert. den. 459 U.S. 1071 (1982). *In Re Midwest Milk Monopolization Litigation*, 454 F.Supp. 281, 287-288 (D.C. Mo. 1978) gives the clearest statement on this matter. The Court stated, "In other words, in camera examination by the Court under circumstances of a particular case is an *appropriate and necessary* exercise of discretion both for the purpose of ruling a motion for production and for the purpose of supervision of the process of production." (emphasis provided). The Court went on, citing *United States v. Nixon*, 418 U.S. 683 (1974) at *In Re Midwest Milk Monopolization Litigation*, supra at 288, "[i]t is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the Court, at that stage, probably admissible in evidence and relevant to the issue of the trial for which it is sought." It is clear that nothing even slightly approaching the above was conducted by the District Court.

By failing to conduct the in camera review, the District Court as affirmed by the Court of Appeals could not know whether the requested information was relevant,

possibly admissible, whether it was needed by the Respondent and whether it occurred before the grand jury. The District Court and the Court of Appeals have rendered a decision on matters they know nothing about. In so doing, they have abused their discretion and grossly violated Petitioner's Fifth Amendment right to due process.

The Respondent never established any "particularized need." Nevertheless, the District Court in adopting the ruling of the District Court, Western District of Missouri, Southern Division stated, without explanation, "The State has shown a particularized need for disclosure of documents." It went on to state, "It is apparent that these documents would assist the State in information needed to prepare the case for trial pending . . . " It is difficult, if not impossible, to ascertain the basis for the District Court's knowledge of this alleged fact since no in camera review or examination was conducted.

The requested information by the Respondent includes "interview notes of witnesses, summaries and affidavits." Since the District Court and the Court of Appeals has given no direction or indication as to what is and is not relevant who, then, is to distinguish. What safeguard has the Petitioner if the decision as to what is to be disclosed is left to the Respondent and the Assistant U.S. Attorney? Clearly, this discretion is for the District Court and not for participating litigants.

2. RESPONDENT'S FAILURE TO EXHAUST OR EVEN INITIATE ALTERNATIVE DISCOVERY METHODS PRIOR TO ITS REQUEST FOR GRAND JURY DISCLOSURE AS GRANTED BY THE DISTRICT COURT AND COURT OF APPEALS CONSTITUTES A VIOLATION OF PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS

Nowhere does the District Court specify or describe what facts were presented by the Respondent to establish in this case a showing of particularized need so as to circumvent the protections of Rule 6(e) Fed.R.Crim.Pro.

Respondent below cited *U.S. v. John Doe*, 481 U.S. 102, 95 L.Ed.2d 94 (1987) to combat Petitioner's assertion that the District Court was speculating as to the public interest and that alternative discovery avenues were available and as yet unreviewed by the Respondent. In the *John Doe* case, the information was being released from one Justice Department attorney to another and thus posed less risk of leakage or improper use than would disclosure to private parties or the general public. See *John Doe*, supra at L.Ed.2d 107-108. In *John Doe*, it was held that grand jury information, upon an adequate showing of particularized need, could be shared by federal government attorneys in the criminal and civil divisions for purposes of determining *whether* a civil action should be initiated. That is not the situation presently before this Court. The Court in *John Doe*, supra at L.Ed.2d 108 stated, " . . . the Court should take into account any alternative discovery tools available by statute or regulation . . . " In this case, the District Court, as affirmed by the Court of Appeals, made no such consideration of alternative discovery tools. The *Doe* Court held that where disclosure is sought

to determine *if* a civil suit lies before the filing of the same, the contemplated use may serve to be cost saving because the Respondent may decide *not* to file suit. See *John Doe*, supra at L.Ed.2d 108 (emphasis provided). The *Doe* Court's analysis emphasizes looking first and possibly filing later. Here, Respondent filed first and now seeks to look. The Court also held, "Finally, because the disclosure authorized in this case would not directly result in any witness testimony being used against him or her in a civil proceeding, there is little fear that the disclosure will have any effect on future grand jury testimony." Supra at L.Ed.2d 109. The opposite is the case here as the respondent seeks to use this information at an adversarial proceeding. The *Doe* Court went on to state, "Of course, when the government requests disclosure for use in an actual adversarial proceeding, this . . . may require a stronger showing of necessity." Supra at L.Ed.2d 110. Such is precisely the case here.

It is clear that grand jury disclosure is not warranted where the requesting party has taken no steps to obtain the requested information from either the normal or alternative sources of discovery. In *Sun Dun, Inc. of Washington v. U.S.*, 766 F.Supp. 463 (E.D. Va. 1991) the Court held that an antitrust plaintiff was not entitled to disclosure of grand jury evidence where the plaintiff had either not attempted to depose witnesses, sought grand jury evidence only in order to cross-examine deposed witnesses in the future, failed to show that the deceased's witnesses information was not available from other witnesses, or had not moved to compel testimony of witnesses who had invoked the Fifth Amendment.

In *Matter of Grand Jury Proceedings Operation Gateway,* 877 F.2d 632 (C.A. 7 Ill. 1989) cert. den. 493 U.S. 1044 (1990) the Court held that the Internal Revenue Service did not demonstrate particularized need for grand jury material against the taxpayer since the IRS (like Respondent here) did not claim that it would be unable to assemble documents it needed but argued only that it would be inconvenient and time consuming to do so given the fact that the IRS already had some of the material. This is precisely analogous to the situation here. Respondent argued below that it would be time consuming and inconvenient to proceed with normal discovery. Additionally, the Respondent, State of Missouri, already has custody of *all* the workers compensation files and billing records and correspondence involved in its possession. Where a party has the means to engage in discovery, as does respondent here, grand jury disclosure is inappropriate. See *In Re Proceedings Before Federal Grand Jury for Dist. of Nevada,* 487 F.Supp. 1098 (D.C. Nev. 1980); *U.S. v. Anderson,* 368 F.Supp. 1253 (D.C. Md. 1973); and *S.E.C. v. Everest Management Corp.,* 87 F.R.D. 100 (D.C. N.Y. 1980).

In addition to making no showing of particularized need, the Respondent clearly has taken no steps to obtain this information (whatever it may be) by normal and available discovery methods and has made absolutely no showing or even an attempt to show that this information is unavailable unless disclosed via disclosure of grand jury secrecy. This case is precisely the type of situation that Rule 6(e) was designed for in order to prevent such abuses.

CONCLUSION

For all the reasons stated, Petitioner prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals, Eighth Circuit.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO 95-2623EMSL/2624/2625EMSL

In Re:	*	Appeal from the United
Grand Jury Investigation.	*	States District Court for
	*	the Eastern District of
	*	Missouri

JUDGMENT

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

The State of Missouri's motion to dismiss the appeal is dismissed as moot.

August 3, 1995

Order Entered at the Direction of the Court

/s/ Michael E. Gens
Clerk U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

In re: Grand Jury Investigation

No. 94-3241

State of Missouri,
Plaintiff - Appellee,
v.
W. E. R.,
Defendant - Appellant.

No. 94-3242

State of Missouri,
Plaintiff - Appellee,
v.
R & R,
Defendant - Appellant.

Appeals from the United States District Court for the Western District of Missouri

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No. 94-3243

State of Missouri,
Plaintiff - Appellee,
v.
S. K. R.,
Defendant - Appellant.

Submitted: March 15, 1995

Filed: May 5, 1995

Before BEAM, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MURPHY, Circuit Judge.

MURPHY, Circuit Judge.

These appeals arise from an order of the district court[1] granting a petition of the State of Missouri for access to certain material related to a grand jury investigation in the Western District of Missouri. The state petitioned under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) for access to various documents and government agents to assist it in pursuing a civil action it brought in the Eastern District of Missouri. Appellants W.E.R., S.K.R., and R & R are defendants in the civil case, and they intervened in the district court to oppose the petition and to move for its dismissal. We affirm.

Grand jury materials are protected under the law, and their disclosure generally is not allowed, Fed. R. Crim. P. 6(e)(2), but certain exceptions exist. The district court found that disclosure here was appropriate as being "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).

In the pending civil case the state seeks to recover funds that were misappropriated from the Second Injury

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[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

Fund, a state administered worker's compensation fund. The state's complaint names thirteen defendants, including appellants, and has six claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., and eleven claims under state law. One of the state law claims alleges that W.E.R. fraudulently transferred misappropriated funds to S.K.R., his wife. The state also claims that S.K.R. is liable to the state under partnership principles because she and W.E.R. allegedly practiced law together. The state claimed in its petition for access that the requested materials would aid in its determination of the liability of each of the civil defendants.

The materials sought are from a grand jury investigation which ended in August 1993 and which focused on a scheme in which supporters of the state attorney general received excessive settlement payments from the Second Injury Fund in return for contributions to his campaign. W.E.R. approached potential donors and arranged for payments to them. The attorney general waived indictment and pleaded guilty to an information, although he denied involvement in the fund scheme. W.E.R. and several other participants pleaded guilty to charges arising from the scheme.

The petition of the state specifically requested access to the following:

1. Any correspondence to or from the attorney general, W.E.R., and one other convicted participant regarding the Second Injury Fund or contributions to the state attorney general. This category also specifically

includes memoranda authored by a number of other individuals, including S.K.R.

2. Interview notes, summaries, and affidavits, with the exception of notes or summaries regarding witness testimony before the grand jury.

3. Notes, summaries, and charts regarding settlement payments made from the Second Injury Fund and contributions to the state attorney general, and the interrelationship between the two.

4. Records, lists, computer files, and reports regarding contributions to the state attorney general.

5. Reports of statistical information or actual case files obtained from the Missouri Division of Worker's Compensation, which administers the Second Injury Fund.

6. Access to the government agents who assisted in the grand jury investigation on condition that they not be asked about actual testimony before the grand jury.

The district court found that at least some of the materials requested by the state were "matters occurring before the grand jury" within the meaning of Rule 6(e)(2), but that they could be disclosed under Rule 6(e)(3)(C)(i).

The purpose of Rule 6(e)(2) is to protect the inner workings of the grand jury. The more a document reveals about that work, the greater the protection it receives under the rule. *See In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 306-07 (8th Cir. 1988). The materials sought by the state vary in their nature. For example, the

letters written by participants in the scheme were generated independently of the grand jury and therefore reveal little about its investigation other than that they were available to the grand jury which may have considered them; they are entitled to diminished protection under the rule. *Id.* at 307. Charts and summaries may reveal somewhat more about what the grand jury considered, but they were prepared by government attorneys or agents and were not the work product of the grand jury. The state is not requesting grand jury minutes or witness transcripts, which are entitled to the greatest protection under Rule 6(e). *Id.* at 306. The requested materials therefore fall along a spectrum and warrant different levels of protection, but none reveal much about the grand jury's inner workings.

A reduced showing of particularized need is required for documents which are entitled to lesser protection under the rule. *Perl*, 838 F.2d at 307. This requires a showing that the material is necessary to avoid "a possible injustice in another proceeding," that "the need for disclosure is greater than the need for continued secrecy," and that the disclosure request is tailored to include only necessary materials. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). The decision to allow disclosure is entrusted to the substantial discretion of the district court, which must weigh the circumstances of each case. The district court will be reversed only if it has abused that discretion. *Id.* at 223.

Appellants argue that the state's showing of particularized need was inadequate and that the district court abused its discretion in allowing disclosure. They first contend that no injustice will result in the civil case if the

information is not disclosed, claiming that the district court incorrectly relied on cost savings as a rationale for disclosure. Cost savings can be a valid consideration, however. *See United States v. John Doe, Inc.*, 481 U.S. 102, 115-16 (1987). The district court also found that the materials are needed for the development of the civil case. The record indicates that access to the materials could aid substantially in the state's preparation of its case, not only saving time and money but also allowing more thorough discovery.[2] For example, the state contends that the grand jury is in possession of the only copies of some documents. One of the prosecutors who assisted in the grand jury investigation also testified by declaration that the requested materials would be beneficial to the state. This combination of factors is sufficient to show that disclosure is necessary to avoid possible injustice. *See Douglas Oil*, 441 U.S. at 222.

The second requirement of the *Douglas Oil* test is that the need for access must outweigh the interest in preserving the secrecy of the grand jury's inner workings. The district court found that the value of continued secrecy was minimal and that disclosure was in the public interest. Appellants argue that this was an abuse of discretion for several reasons. First, they contend that the district court improperly considered the fact that the grand jury had concluded its investigation in August 1993. The end

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[2] The state also suggests that it is concerned that some of the civil defendants who still face possible state criminal charges might invoke their right against self-incrimination and refuse to comply with discovery requests. At this point that concern is only speculation, however.

of a grand jury inquiry reduces the interests in grand jury secrecy, however. *In re Grand Jury Proceedings Relative to Perl*, 838 F.2d 304, 307 (8th Cir. 1988). Here, the grand jury concluded its work almost two years ago and issued a number of indictments. The state mentioned at oral argument that some grand jury materials, including transcripts, became public at the attorney general's eleven-day sentencing hearing. The interests in secrecy are reduced further by numerous media reports with details of the scheme and the names of its participants, including the defendants in the civil case. The need for continued secrecy is therefore minimal.

Consideration of the five reasons given by the Supreme Court in *Douglas Oil* for maintaining grand jury secrecy supports this conclusion. 441 U.S. at 219 n.10. Since the investigation is over, the grand jurors are no longer involved and cannot be influenced or intimidated. There is also no danger that the subjects of the grand jury inquiry will flee. Because the state has carefully excluded from its request any information regarding witnesses who actually testified before the grand jury, there is little reason to be concerned that disclosure might cause witnesses in this or future grand jury investigations to fear retribution. Finally, disclosure to the state poses relatively little danger to personal reputations. The grand jury has returned its indictments. The civil case has already made public the alleged involvement of the defendants who were not indicted. The grand jury materials can therefore do little but add specifics to already well known general allegations. The state's need for the grand jury materials outweighs the reduced importance of secrecy.

The appellants also argue that the state's request was not tailored to include only necessary materials. They argue that the district court should have imposed conditions of disclosure similar to those in *United States v. Armco Steel Corp.*, 458 F.Supp. 784 (W.D. Mo. 1978). In *Armco*, the Justice Department was willing to support disclosure if the civil plaintiffs seeking it would agree to a number of conditions, which they did. Federal officials here have not conditioned their support of disclosure, however, and the state's request is not overly broad. The state's petition appears limited to materials which are needed in the civil case. It explicitly avoided asking for information which would reveal actual testimony before the grand jury, such as witness notes and summaries. The enumerated requests also appear highly relevant to the state's articulated purpose of determining the liability of each defendant in the civil action.

Because the state demonstrated sufficient particularized need for the categories of requested materials, we find no abuse of discretion by the district court in granting the petition for access. Although the need for the requested materials is not as urgent as in some Rule 6(e) cases, the need for secrecy is greatly diminished. Disclosure here is consistent with the policies which underlie Rule 6(e).

Appellants raise several other arguments on appeal. First, they claim that the district court erred by not granting their motion for a hearing on the petition for access. Rule 6(e)(3)(D) requires that the parties to the proceeding for which grand jury materials are sought be given "a reasonable opportunity to appear and be heard." Fed. R. Crim. P. 6(e)(3)(D). Appellants contend that the district

court was therefore required to grant a hearing. The word "heard" does not warrant such a literal reading, however. All parties had the opportunity fully to brief the issues regarding access. Although a hearing may sometimes be necessary to explore the ramifications of granting access, appellants cite no authority holding that Rule 6(e)(3)(D) requires one under all circumstances. As with other issues under the rule, the decision to hold a hearing should be entrusted to the discretion of the district court. That discretion was not abused here.

Appellants also argue that they were denied due process because they did not have an opportunity to confront adverse witnesses, especially the Assistant United States Attorney who submitted a sealed declaration to the court on the propriety of disclosure. They also argue his declaration should not have been considered by the court; it was "irrelevant and improper."

Justice Department attorneys are not adverse witnesses in a traditional sense. Their duty is to protect grand jury secrecy where required. *See Illinois v. Sarbaugh*, 552 F.2d 768, 777 n.14 (7th Cir.), *cert. denied, J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977). The fact that the prosecutor took a position contrary to that of the appellants does not transform his role into that of an adverse witness. The Supreme Court has acknowledged that such attorneys can play an important role in assessing the prudence of disclosure. *Douglas Oil*, 441 U.S. at 226. In exercising their judgment, they must necessarily consider sensitive information, including for example which materials were examined by the grand jury. Sealed submissions ensure that district courts receive full and frank

evaluations by the attorneys who participate in grand jury investigations.[3]

The appellants argue next that the state's petition should have been transferred to the Eastern District of Missouri where the civil action is pending. Rule 6(e)(3)(E) provides for transfer of a petition for access to the court where the ongoing judicial proceeding is located unless the court presented with the petition "can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper." *See also Douglas Oil.* 441 U.S. at 230-31 (1979). The situation here is unlike that in *Douglas Oil* where transfer was appropriate. There the court in which a civil antitrust action was pending, rather than the court supervising the grand jury, was more likely to have noticed "important differences" between the allegations in the indictment and the "contours" of the cause of action in the civil case. *Id.* at 229. It is clear from the complaint in this case that the criminal and civil actions are closely related. The state is the victim under

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[3] Appellants' citation to *Wolff v. McDonnell,* 418 U.S. 539 (1974), is unpersuasive. They claim that *Wolff* supports their view that "[t]he right to confront and cross-examine witnesses is a fundamental aspect of procedural due process and such right applies not only in criminal proceedings but also in non-criminal proceedings, including administrative and quasi-judicial proceedings." Appellants Brief at 34. The holding in *Wolff* was that prison inmates did not have a right to cross-examine witnesses at disciplinary hearings because of institutional concerns regarding security 418 U.S. at 567-69. Petitions for access to grand jury materials present analogous concerns. The need for candid assessments by Justice Department attorneys and for continued secrecy during the evaluation of the petition supports the use of sealed affidavits for this limited purpose.

both the criminal and civil theories, the elements of the causes of action are very similar, and the acts giving rise to criminal liability are the precise acts which will lead to civil liability if the state is successful. The parties informed the district court of the status of the civil litigation, and appellants filed several motions to dismiss similar to some pending in the Eastern District. We conclude that the district court had sufficient knowledge to determine whether disclosure of the requested materials was proper.

Appellants also appeal from the denial of their motions to dismiss the petition for access. They assert that the civil complaint was not pleaded with sufficient particularity under Federal Rule of Civil Procedure 9(b) and that the RICO claims are inadequate in several respects. The district court presiding over the civil action recently denied appellants' motions to dismiss the civil complaint based on the same grounds. *Missouri v. Roussin*. No. 4:93CV2633-DJS, slip. op. at 9, 20 (E.D.Mo. April 10, 1995). That action is ongoing, and the petition for access to grand jury materials is "in connection with [that] judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i). Appellants have not shown that the district court erred in denying their motions to dismiss the petition.

One issue raised in the motion to dismiss the petition for access warrants further discussion; that is the issue of standing. Appellants argue that the state was not injured and therefore does not have standing to bring the civil action, but even if it did, the state should not have brought the action in its own name. They argue that the state may therefore not petition for access and that the district court should have dismissed the petition.

In support of their claim that the state did not suffer an injury sufficient to confer standing, appellants cite two cases from the Seventh Circuit in which RICO actions brought by state governments were dismissed. *Dillon v. Combs*, 895 F.2d 1175 (7th Cir.1990); *People of State of Illinois v. Life of Mid-America Insurance Co.*, 805 F.2d 763 (7th Cir. 1986). *Dillon* and *Mid-America Insurance* were each brought by a state on behalf of its citizens who allegedly had been injured. *Dillon*, 895 F.2d at 177, *Mid-America Insurance*, 805 F.2d at 766. In this case, however, Missouri alleges direct injury to itself, not to its residents or consumers, because funds were misappropriated from a state-administered account. Where the state suffers harm, it may bring suit. *See Illinois Dept. of Revenue v. Phillips*, 771 F.2d 312, 315-17 (7th Cir. 1985); *cf., Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S. Ct. 3275, 3285-87 (1985).

The statutory structure of the Second Injury Fund supports the conclusion that the state has standing to bring the civil action and is the real party in interest under Federal Rule of Civil Procedure 17(a). The Second Injury Fund is financed by a tax collected by the state. The state treasurer is the custodian of the fund, Mo. Rev. Stat. § 287.220.1, and the Division of Workers' Compensation administers it. Mo. Rev. Stat. §§ 287.220, 287.590. The state possessed the funds when they were misappropriated and was holding them for future disabled recipients. Because current and past Second injury Fund recipients have received their compensation despite the alleged fraud, only the state was directly injured, and it can redress that wrong by replacing the funds if the suit is successful. The state therefore has standing.

Appellants contend that the civil action should have been brought in the name of the state Division of Workers' Compensation, or perhaps the state treasurer, rather than by the state itself. As appellants assert, the Second Injury Fund statute requires that all suits against the fund for benefits include the treasurer as a party, Mo. Rev. Stat. § 287.220.2, and the Division of Workers' Compensation may sue or be sued in its own name. Mo. Rev. Stat. § 287.590. The statute also provides, however, that if an employer does not have the required worker's compensation insurance, the "office of the attorney general of the state of Missouri shall bring suit." Mo. Rev. Stat. § 287.220.5. The statute does not specify that the attorney general must bring the action on behalf of the treasurer or any other office or department. *Id.*, *see also* Mo. Rev. Stat. § 27.060. The situation in this case is comparable to a suit against an uninsured employer. Both involve the state pursuing a third party to recover expenditures from the Second Injury Fund that would not have been made had the third party complied with the law. No other provision of Missouri law limits the state's ability to bring this suit in its own name. The state is the real party in interest and has standing to petition for access.[4]

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[4] The district court presiding over the civil action recently denied the appellants' motions to dismiss that case for lack of standing. *Missouri v. Roussin*, No. 4:93CV2633-DJS, slip. op. at 19-20 (E.D.Mo. April 10, 1995).

Accordingly, for the reasons discussed, the order of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: GRAND JURY INVESTIGATION RELATIVE TO MORRIS KESSLER, et al.	))))	**No. 4:94MC37-DJS** **ORDER UNDER SEAL**

ORDER

The State of Missouri petitions the Court pursuant to Fed.R.Crim.P. 6(e)(3)(C)(i) for access to various documents and government agents involved in grand jury investigations in this district. The State seeks the requested disclosures to assist its pursuit of the civil action now pending in this district as *State of Missouri v. William E. Roussin, et al.*, No. 4:93CV2633-DJS. Several of the defendants in that action have sought leave to intervene in this miscellaneous matter and have filed motions and memoranda in opposition to the State's petition for disclosure.

A similar petition was filed in the United States District Court for the Western District of Missouri, seeking access to materials considered by its grand jury which might be relevant to the *Roussin* case. The Honorable Russell G. Clark of that Court granted the State's petition. *In re: Grand Jury Investigation Relative to William Webster, et al.*, No. 94-MC-9015, slip op. (W.D.Mo. August 9, 1994). The Eighth Circuit has recently affirmed that ruling. *State of Missouri v. W.E.R. et al.*, Nos. 94-3241, 94-3242 and 94-3243, slip op., 1995 WL 259271 (8th Cir. May 5, 1995). Upon careful consideration, and in view of the substantial identity of the disclosure sought in the two districts

and of the opposition thereto, this Court will adopt the reasoning of both the Western District and of the Eighth Circuit in granting the instant petition. The Court hereby incorporates by reference the rationale of Judge Clark's August 9, 1994 order and the Court of Appeals' May 5, 1995 opinion, and concludes that neither a hearing nor further discussion is warranted.

Accordingly,

IT IS HEREBY ORDERED that the motions of William Londoff, William E. Roussin, Susan K. Roach, and Roussin and Roach to intervene are granted.

IT IS FURTHER ORDERED that the motions of Morris B. Kessler, V. John Kessler, Kessler and Kessler P.C., William E. Roussin, Susan K. Roach and Roussin and Roach for a hearing are denied.

IT IS FURTHER ORDERED that the motions of William E. Roussin, Susan K. Roach, and Roussin & Roach to dismiss the State of Missouri's petition for disclosure of documents in possession of grand jury are denied.

IT IS FURTHER ORDERED that the motion of William E. Roussin to strike statement of AUSA James Martin is denied.

IT IS FURTHER ORDERED that the State of Missouri's petition for disclosure of certain enumerated documents in possession of grand jury and for access to and use of grand jury agents and their work product is granted.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

Dated: 5/8/95

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2623EMSL
No. 95-2624EMSL
No. 95-2625EMSL

In Re:	*	Appeal from the United
	*	States District Court for
Grand Jury Investigation	*	the Eastern District of
	*	Missouri
	*	

The petition for rehearing filed by the appellants has been considered by the court and is denied.

September 1, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gens
Clerk, U.S. Court of Appeals, Eighth Circuit.

Rule 6(e) Federal Rules of Criminal Procedure

* * *

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for

the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to –

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal

criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made –

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the

grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to

be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

* * *